IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.203 OF 2005

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Oil & Natural Gas Corporation Ltd. ...Petitioner

v/s.

Western Geco International Ltd. ...Respondent

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Mr.D.R.Zaiwala with Mr.P.A.Sawant and Mr.Prakash Shinde i/b M/s. M. Dhruva & Co. for the Petitioner.

Mr.P.J.Khambata i/b Mr.Hemant Sethi for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 12TH DECEMBER,2005

JUDGMENT:

1. By this Petition the Petitioner challenges the award made by the arbitral tribunal dated 4-2-2005 directing the Petitioner to pay to the Respondent a sum of US$ 2,936,607.82 (USD two million, nine hundred thirty-six thousand, six hundred seven and eighty-two cents only) with interest.

2. The facts that are material and relevant for deciding this petition are that the Petitioner ONGC is a public sector undertaking engaged in the business of drilling and exploration of oil within India. The Respondent is a company duly incorporated under the laws of British Virgin Island, engaged in the business of oil exploration and related activities in India. Some time in November, 1999 the Petitioner floated a tender notice inviting offers for technical upgradation of Seismic Survey Vessel M.V. Sagar Sandhani with a view to modernizing it.

In the tender specifications one of the equipment required for upgradation was "streamers" fitted with Hydrophones. Since the national origin of the hydrophones had not been specified, it was taken as an option given to the bidder. In response thereto M/s. Geco Pralka International Ltd. (renamed Western Geco International Ltd- the Respondent herein) submitted its Bid No.IND::/043/99 offering to supply Nessie 4 streamers equipped with hydrophones. By letter dated October 10, 2000 the Petitioner informed the Respondent of the award of the contract to it. The Respondent by letter dated October 25, 2000 accepted the award of the contract. The contract was signed on June 18, 2001 but before that the vessel was handed over by the Petitioner on April 10, 2001 and the Respondent commenced upgradation work thereon forthwith. The vessel was to be returned to the Petitioner duly upgraded by July 9, 2001 but due to delays having taken place the vessel was actually handed over to the Petitioner on May 6, 2002.

3. In the tender, specification of the equipment required for upgradation was "Streamers" fitted with Hydrophones. Point of the make of hydrophone was

left to the bidder subject to meeting the specification. Initially the Respondent decided to fit the vessel with U.S. made hydrophones, because they possessed general licence from the U.S. government. But some time around June 26, 2001 the Respondent realised that they cannot sell the US Hydrophones without getting a specific licence from the U.S. Government. Thereafter, the Respondent made an application for grant of licence to the U.S. Government. It has come on record that on September 10, 2001, a day before the terrorist attack on the Trade-centre in New-York, the Respondent was notified by the US authorities that they intended to deny the licence. After the terrorist attack the Respondent realised that it is impossible to get licence from the U.S. authorities for the sale of hydrophones. The Respondent, therefore, communicated their inability to fit US hydrophones to the vessel and further informed that they will fit the hydrophones of Canadian make to the vessel which are of the same specifications. It appears that though the Petitioner did not play any role in the decision that was made by the Respondent initially to fit the U.S. Hydrophones to the vessel, the Petitioner took considerable time to agree to the fitting of

hydrophones of Canadian make to the vessel. The Respondent firmly informed the Petitioner by letter dated 24th October, 2001 that they do not desire to pursue their application with the U.S. authorities for grant of licence and by letter dated 25th October, 2001 they supplied the price of the Canadian hydrophones to the Petitioner. It appears that thereafter in stead of taking immediate decision the Petitioner took considerable time to agree to the proposal. As a result of all these developments there was delay in delivering the vessel. Under Clause 14 of the contract between the parties the Petitioner was entitled to make deduction of amounts from the invoices submitted by the Respondent, if there is delay in delivery of the vessel. Clause 16 of the contract also provides for deduction of liquidated damages from the amount payable to the Respondent for the delay in delivery of the vessel. The Petitioner had deducted amounts under Clause 14 and Clause 16, because there was delay in delivery of the vessel. The Petitioner also deducted amount of US$410641.20 and the amount of US$80530.10 from the amount payable to the Respondent. According to the Petitioner, the Respondent had quoted the price including the income-tax payable by the Respondent

under Section 44-BB of the Income-tax Act, but in fact no such tax was payable by the Respondent and therefore by recovery of the amount from the Petitioner the Respondent would have been unjustifiably enriched and therefore these deductions were made.

4. Before the arbitral tribunal, the Respondent had claimed refund of the amount which was deducted under clauses 14 and 16 of the contract and also for the refund of the amount that was deducted in relation to the provisions of Section 44BB of the Income-tax Act. The arbitral tribunal by its award which is impugned in the petition held that the Respondent was responsible for the delay in delivery of the vessel and therefore the deduction under Clauses 14 & 16 have been rightly made, except for the period from 1-11-2002 to 23-3-2002. In other words, the delay for the period from 1-11-2001 to 23-3-2002, according to the arbitral tribunal cannot be attributed to the Respondent. This roughly is the period during which the Petitioner kept pending the request made by the Respondent for permission to fit the Canadian hydrophones to the vessel. The arbitral tribunal also held that the Petitioner was not justified in

deducting any amounts in relation to the provisions of Section 44BB of the Income-tax Act. The arbitral tribunal has also held that on the amount which is directed to be refunded, the Respondent is entitled to interest and accordingly interest has been awarded.

5. Before me, submissions were made by the learned Counsel appearing for the Petitioner only on three aspects; (i) The learned Counsel appearing for the Petitioner challenged the finding recorded by the arbitral tribunal that the delay for the period from 1-11-2001 to 23-3-2002 is not attributable to the Respondent. (ii) the learned Counsel challenged the finding recorded by the arbitral tribunal that the Petitioner was not justified in deducting any amounts from the amounts payable to the Respondent in relation to Section 44BB of the Income-tax Act; and (iii) the learned Counsel submitted that the arbitral tribunal has directed the payment of interest on the deducted amount which has been directed to be refunded contrary to the provisions of the Contract.

6. Now, so far as the first aspect i.e. the finding recorded by the arbitral tribunal that for the delay

from 1-11-2001 to 23-3-2002 the Respondent cannot be held responsible is concerned, perusal of the petition shows that there is no ground in the petition challenging that finding. Really speaking therefore the Petitioner could not have argued that point. However, even if it is assumed that the Petitioner can be permitted to argue that ground without it being raised in the petition, in my opinion, the finding cannot be disturbed, because it is essentially a finding of fact recorded by the arbitral tribunal. The arbitral tribunal has held that in the tender specification of the equipment required for upgradation of the vessel was "streamers" fitted with Hydrophones. The choice of the make of the Hydrophones was left to the Respondent subject to meeting the specifications given in the tender document. The decision to fit the vessel with U.S. Hydrophones was entirely that of the Respondent. The Petitioner did not play any role in that decision. Therefore, once the Respondent on realising that they cannot fit the U.S. Hydrophones to the vessel, intimated that fact to the Petitioner and also informed them that they are willing to supply Hydrophones of Canadian make of the same specification, the Petitioner was not justified

in keeping the matter pending. The arbitral tribunal has found that in stead of making an inquiry to find out whether the Hydrophones of Canadian make offered by the Respondent are of the same specification or not, the Petitioner was exploring possibility of securing licence in favour of the Respondent so that U.S. Hydrophones can be fitted by the Respondent to the vessel and it is only after the Petitioner realised that the Respondent cannot get the license from the U.S. authorities that the permission was granted. For all these reasons, therefore, after referring to the correspondence exchanged between the parties in detail during the relevant period, the arbitral tribunal has found that the delay after 31st October, 2001 cannot be attributed to the Respondent. I find that this finding of fact has been recorded by the arbitral tribunal after considering the material available on record and this finding is not only a possible finding that can be recorded on the basis of the material on record, but in my opinion, it is the only finding that could have been recorded by the arbitral tribunal on the basis of the material on record.

7. So far the question of refund of the amount

deducted by the Petitioner from the bills payable to the Respondent in relation to Section 44BB of the Income-tax Act are concerned, according to the learned Counsel appearing for the Petitioner while submitting the tender the Respondent had informed the Petitioner that the price quoted by them is inclusive of corporate income-tax as per Section 44BB of the Income-tax Act and therefore, according to the Petitioner the price quoted by the Respondent included the amount of corporate income-tax payable under Section 44BB of the Income-tax Act. However, as the entire scope of the work was completed at the Respondent's designated Ship Repair Unit at Singapore and as the upgraded vessel was handed at the Respondent's designated Ship Repair Unit to the Petitioner, no part of the work was carried out in India. Upgraded vessel was also handed to the Petitioner at Singapore. This was a turn-key project to be completed at Singapore for a contract price of US$ 17,221,384 and therefore, no corporate income-tax under Section 44BB was payable by the Respondent. According to the Petitioner as the price quoted by the Respondent included the amount of corporate income-tax payable under Section 44BB of the Income-tax and as no such tax was actually paid by

the Respondent the Respondent has unjustifiably been enriched and therefore, the Petitioner was justified in deducting the amount from the bills payable to the Respondent. The learned Counsel appearing for the Petitioner relied on a judgment of the Supreme Court in the case of Mahabir Kishore and ors, v/s. State of Madhya Pradesh, AIR 1990 SC 313 to claim that the Petitioner is entitled to claim the amount under the doctrine of "unjust enrichment". The judgment of the Supreme Court in the case of Mahabir Kishore (supra) was the only authority on which the learned Counsel appearing for the Petitioner relied in support of his submission that the Petitioner was justified in deducting the amount in relation to Section 44BB of the Income-tax Act. Perusal of the judgment in the case of Mahabir Kishore (supra) shows that in that case the State Government had levied a tax on sale of liquor. Levy of tax was challenged before the High Court. The High Court held that the State Government was not competent to levy that tax and therefore levy of that tax was held to be illegal. However, during the pendency of the petition the liquor sellers continued to pay the tax to the State Government. A civil suit was filed by one of the liquor seller for recovery of the amount which was paid to the State

Government as tax, which the High Court had held the Government had no authority to recover. The suit was held by the trial court to be barred by the law of limitation, as according to the trial court the period of limitation is to be computed from 17-10-1961, the date on which the Government decided not to charge the tax. The question that the Supreme Court was considering in that case was the point of time from which the period of limitation starts running for a suit of such nature. While deciding this main issue, the Supreme Court has also considered in that judgment the doctrine of "unjust enrichment". Perusal of that judgment shows that so far as India is concerned, money paid under mistake can be recovered because of the provision of Section 72 of the Contract Act. Thus, the law that can be said to have been laid down by the Supreme Court is that if a person claims that he has paid money to the other person under a mistake of law, then he can bring in an action against that person for recovery of the amount and the period of limitation for bringing in that action would start from the time when he realised his mistake. So far as the present case is concerned, I do not find that the Petitioner has pleaded anywhere that it accepted the price

quoted by the Respondent which according to the Petitioner included the amount of corporate tax payable under Section 44BB of the Income-tax Act under any mistake. When the price quoted by the Respondent was accepted by the Petitioner, it was clearly known to the Petitioner that the entire work would be completed in Singapore and therefore, any liability of payment of corporate income-tax under Section 44BB is not like to arise, and therefore, it could not have been said by the Petitioner that it agreed to the price quoted by the Respondent because it was under any mistake. In the absence of any pleading of mistake, in my opinion, no case can be made out by the Respondent for recovery of any amount. In the present case, in my opinion, even if it is assumed that the Petitioner agreed to the amount quoted by the Respondent under mistake and therefore, was entitled to recover the amount still no fault can be found with the award that is made by the arbitral tribunal, because there is no authority given to the Petitioner under the contract to deduct the amount for this reason from the bills payable to the Respondent. Perusal of the contract between the parties shows that wherever the parties wanted to make a provision for giving authority to the

Petitioner to deduct the amount, a provision specifically has been made in the contract. For example clauses 14 and 16 of the contract. Therefore, had it been the intention of the parties to permit the Petitioner to make deduction for any other reasons, then a specific provision would have been made in the contract. Therefore, even if the Petitioner was entitled to recover the amount from the Respondent, still the Petitioner had no authority to deduct the amount from the amount payable to the Respondent. Deductions from the amount that was payable to the Respondent could have been made by the Petitioner only in accordance with the terms of the contract. As there was no term in the contract, the deduction made by the Petitioner was clearly contrary to the contract between the parties. Section 28(3) of the Arbitration & Conciliation Act casts a duty on the arbitral tribunal to decide the disputes brought before it in accordance with the terms of the contract. Therefore, the moment the arbitral tribunal finds that there is no term in the contract which authorises the Petitioner to deduct the amount in this regard, the only option left with the arbitral tribunal was to direct the refund of the amount.

8. So far as the award made by the arbitral tribunal for payment of interest is concerned, it is submitted that according to terms in the contract between the parties, interest on disputed amount cannot be awarded, and therefore, according to the Petitioner by the award when the interest is awarded on the amounts which were disputed, the award is contrary to the provisions in the contract. In support of this proposition reliance is placed on a judgment of the Supreme Court in the case of ONGC v/s. Saw Pipes Ltd., JT 2003(4) SC 171. Perusal of the award shows that the arbitral tribunal has held that when the term in the contract provides that no interest shall be payable on the disputed amount, what it really means is when the dispute is genuine or reasonable then the interest is not payable. But if the dispute is raised unreasonably, then according to the arbitral tribunal it will be unjust to deny payment of interest to the claimant. Perusal of the award shows that the amount that has been directed to be paid by the award was mainly the amount deducted by the Petitioner in relation to Section 44BB of the Income-tax Act. I have found that there was no justification whatsoever either in the contract or in

the law for the Petitioner to deduct that amount and therefore, in my opinion, no fault can be found with the arbitral tribunal in terming that deduction or dispute as unreasonable. In my opinion, the interpretation placed on the provisions of the Contract by the arbitral tribunal that the provisions prevent payment of interest only on those disputed amounts where the dispute raised is reasonable or genuine, is a possible interpretation and therefore, in my opinion, even the finding recorded by the arbitral tribunal in relation to payment of interest to the Respondent cannot be faulted.

9. For all these reasons, therefore, the petition fails and is dismissed. The Petitioner is directed to pay costs of the petition to the Respondent, as incurred by the Respondent.

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